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No. 01-1084

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALLISON DESMOND, et al., On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

BANKAMERICA CORPORATION, JOSEPH HEMPEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Page

CASES

Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs,
398 U.S. 281 (1970) 3

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 3

Devlin v. Scardelletti,
122 S. Ct. 663 (2001) 2

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,
484 U.S. 49 (1987) 1

In re Microsoft Corp. Antitrust Litig., MDL 1332,
2002 U.S. Dist. LEXIS 728 (D. Md. Jan. 11, 2002) 2

Matsushita Electrical Industrial Co. v. Epstein,
516 U.S. 367 (1996) 3

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 2

Vendo Co. v. Lektro-Vend Corp.,
433 U.S. 623 (1977) 1

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§77p(b)-(c) 3

§78bb(f)(1)-(2) 3

28 U.S.C.
§2283 ..... 1, 4

Federal Rules of Civil Procedure
23 2

Respondents' opposition to the petition is long on irrelevant procedural background and taking potshots at petitioners' counsel, but short on confronting the important issues petitioners identify that merit certiorari. The Anti-Injunction Act, 28 U.S.C. §2283, is scarcely mentioned by respondents. They make no effort to defend the federal anti-suit injunction that shut the door to all practical relief for a class of defrauded BankAmerica shareholders in the California state courts.

Respondents' avoidance is understandable. As the petition explained, the injunction halting the *Desmond* state action cannot be sustained under any conceivable test for applying the Anti-Injunction Act's "expressly authorized" exception. Of particular interest to this Court, the decision below compounds a circuit split on the proper test to apply. The confusion in the circuits stems ultimately from the divided decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Although *Vendo* was the last time this Court addressed the "expressly authorized" exception, the decision failed to produce a majority opinion and left the law unclear. *See* Petition 13-25. The need to end the uncertainty *Vendo* has generated is a matter of vital importance to the federal courts and is not eliminated by pretending it does not exist.

Respondents' subsidiary justifications for denying certiorari lack merit. A party claiming mootness carries a "heavy" burden. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). Respondents have shown nothing more than the possibility of a settlement of the federal case.

As respondents recognize, any class-action settlement must be approved by the district court after giving class members the opportunity to opt out and to object. *See* Fed. R. Civ. P. 23; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Judicial approval is hardly a foregone conclusion and parties often are sent back to the drawing board if the proposed settlement is found to be inadequate. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, MDL 1332, 2002 U.S. Dist. LEXIS 728 (D. Md. Jan. 11, 2002). Indeed, although respondents claim the apparent settlement is valued at $490 million, this is considerably less than the billions of dollars in estimated damages that, but for being wrongly enjoined, might have been recovered for the same shareholders in the *Desmond* California state suit. 8th Cir. App. 141-71.

Additional litigation is especially likely if the settlement is tied up by collateral attacks. Appeals of class-action settlements are common. This Court granted certiorari this Term to address whether unnamed class members must intervene in the district court to gain standing to appeal a settlement. *Devlin v. Scardelletti*, 122 S. Ct. 663 (2001). In light of the district court's aggressive approach to enjoining the *Desmond* action – to the point of barring any mediation efforts in the state case – that court may see fit to halt the *Desmond* proceedings during any federal appeal. In short, respondents have shown only that the injunction may be extinguished if certain conditions precedent are satisfied. This conjecture is little comfort to the *Desmond* plaintiffs, who have been barred from pursuing their state claims, and a potentially more favorable result, for nearly two years. With good reason, mere speculation of mootness (all litigation must end at some point) is no

basis for denying an aggrieved party the redress of the courts or the state forum of their choice.

Respondents alternatively contend that the petition should be denied because the state suit, a securities class action in the California courts, would now be barred by the Securities Litigation Uniform Standards Act, making a federal anti-suit injunction of a state securities class action unlikely to recur. *See* 15 U.S.C. §§77p(b)-(c), 78bb(f)(1)-(2). But the logic of the decision below is not so restricted. By disregarding *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996) – which holds that state courts must be given deference whenever "dual litigation" is "contemplated" – the Eighth Circuit's analysis significantly impacts numerous other areas of litigation in which state and federal courts have dual jurisdiction. *Id.* at 383. These areas include antitrust, civil rights, and employment actions. *See* Petition at 15, 26. Hence this case is far from *sui generis*.

Because the Private Securities Litigation Reform Act does not, even remotely, no matter how its language is stretched, allow a federal court to enjoin a state proceeding, respondents suggest an injunction is justified to police purported lawyer misconduct in state court. That notion – dubious on its face and supported by no authority – falters for the simple reason that state judges, on this subject and any other potentially affecting a federal right or interest, are to be trusted to address the objection in the state forum. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). Review is through the state courts and, if necessary, certiorari review by this Court. *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). The blunderbuss of a federal anti-suit injunction

flouts the respect that must be accorded to state courts and basic principles of federalism that have driven the Anti-Injunction Act for over 200 years.

Finally, respondents are incorrect that petitioners somehow acquiesced in the so-called "factual findings" supporting the injunction. On the contrary, petitioners argued that their counsel did nothing improper by electing the state forum because, among other things, it held the prospect of recovering substantially greater damages for the class. Appellants' Opening Bf. 4-14; Reply Bf. 3-6. Again, the propriety of this choice was confirmed by the California state judge who witnessed the events in *Desmond*. *See* Petition at 8. In any event, respondents' effort to salvage the injunction based on "factual findings" is barren. It makes no difference that a federal anti-suit injunction may be "expressly authorized" by "factual findings" if it is not "expressly authorized" by "Act of Congress." 28 U.S.C. §2283.

For the unrebutted reasons stated in the petition, this Court should grant certiorari to clarify the law governing the "expressly authorized" exception.

DATED: March 8, 2002

Respectfully submitted,

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